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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

[WAC 01 173 52070]

OFFICE: VERMONT SERVICE CENTER

DATE: **FEB 23 2010**

IN RE:

Applicant:

APPLICATION: Application for Temporary Protected Status under Section 244 of the
Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the Vermont Service Center. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The record reveals that the applicant filed a TPS application during the initial registration period, and said application was approved on April 8, 2002, by the Director, California Service Center.

The director withdrew the applicant's TPS because he had been convicted of at least two misdemeanors in the United States.

On appeal, counsel asserts that numerous courts, including the Supreme Court, have held that probation is not considered a conviction.¹ Counsel asserts that the applicant was placed on probation for all of his alleged offenses and pursuant to precedent decisions the charges should not be deemed convictions.

An alien shall not be eligible for temporary protected status under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. See Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under the term "felony" of this section. For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 244.1.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

In response to a Notice of Intent to Withdraw TPS dated March 25, 2009, the applicant submitted the requested court dispositions, which revealed the following misdemeanor offenses in the state of California:

1. On June 1, 1996, the applicant was arrested under the alias [REDACTED] for disorderly conduct – prostitution, a violation of section 647(b) PC, and driving without a license, a violation of section 12500(a) VC. On June 3, 1996, the applicant was convicted of both offenses. Imposition of sentence was suspended and the

¹ Counsel cites *Caldwell v. Quarterman*, 127 S. Ct. 431, 432, 166 L. Ed. 2d 301 (2006) and *Davis v. State*, 968 S.W.2d 368, 271 (Tex. Crim. App. 1998).

applicant was placed on summary probation for one year under the condition of serving five days in jail for violating section 647(b) PC. Imposition of sentence was suspended and the applicant was placed on summary probation for one year for violating section 12500(a) VC. [REDACTED]

2. On June 1, 1996, the applicant was arrested under the alias [REDACTED] for disorderly conduct – prostitution, a violation of section 647(b) PC. On June 24, 1996, the applicant was convicted of this offense. Imposition of sentence was suspended and the applicant was placed on summary probation for one year under the condition of paying a fine or serving 5 days in jail. The remaining offenses were dismissed. [REDACTED]
3. On July 31, 2005, the applicant was arrested for driving under the influence of alcohol, a violation of section 23152(a) VC, driving with .08 percent or more alcohol in the blood, a violation of section 23152(b) VC, giving false information to a peace officer, a violation of section 31VC, and falsely represents self to officer, a violation of section 148.9(a) PC. On August 22, 2005, the applicant pled *nolo contendere* to violating section 23152(b) VC. Imposition of sentence was suspended and the applicant was placed on summary probation for three years under the condition of paying a fine or serving thirteen days in jail. The remaining offenses were dismissed. [REDACTED]

On appeal, counsel asserts that the director erred in his decision because the “sentence was suspended in all of the applicant’s alleged convictions and he complied with all the probationary terms.” However, neither the acknowledgement of past mistakes nor the applicant’s satisfactory completion of all of his court obligations eliminates the applicant’s convictions.

Violating section 647(b) of the California Penal Code, and sections 23152 (a first violation) and 12500 of the California Vehicle Code are punishable by imprisonment for up to six months in the county jail. As defined for immigration purposes in 8 C.F.R. § 244.1, a misdemeanor is any offense that “is punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any.” Therefore, the convictions are considered to be misdemeanors for immigration purposes.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Immigration and Nationality Act.

The court dispositions submitted reflect that the applicant pled *nolo contendere* or guilty of the offenses and the judge ordered some form of punishment to the charges above. Therefore, the applicant has been "convicted" of the offenses for immigration purposes.

The applicant is ineligible for TPS due to four misdemeanor convictions detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to withdraw TPS will be affirmed.

An alien applying for temporary protected status has the burden of proving that he or she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet this burden.

ORDER: The approval of the TPS application is withdrawn. The appeal from the withdrawal of the TPS application is dismissed.